THE

AMERICAN LAW REGISTER.

APRIL, 1855.

TRIAL WITHOUT JURY.[1]

The Judicial Character.

The judges may find it an easier duty to try cases unembarrassed by juries; but they will, we think, feel it to be a nobler function with which they may now find themselves invested, that of forming and giving expression to their own judgments instead of acting as the assistants of other men. Hitherto their duty has been to state, as clearly as might be, the questions to be decided, and to direct and assist, by what is called a careful summing up, twelve men, whose minds may be already possessed by prejudice, or puzzled by the sophistry, or disturbed by the clamor, or led astray by the eloquence of opposing counsel. Some judges, also, with more or less skill and success, and more or less consistently with their duty, have had the habit of making attempts to lead juries to right verdicts,

[1] By the English Common Law Procedure Act of 1854, the Judges of the Superior Courts of Common Law are enabled to try, with the consent of the parties, questions of fact without the intervention of a jury. This radical change in the law has attracted much professional attention, and we give our readers the article presented by the *Law Magazine* for February, 1855.

or to what the judges have deemed right verdicts. There were persons who thought that occasionally the summings up of Lord Abinger had too much the character of pleadings in favor of the side which he considered entitled to the verdict. In the former part of his life at the bar, he had a certain way of his own of telling the jury what their verdict ought to be, so as to leave them scarcely the power of deliberation. This command over juries was more appropriate to the bench, and was frequently, in the case of Lord Abinger, irresistible. We remember a trial at which he presided at Stafford, in which, in the course of his summing up, he explained and illustrated the paradox: the greater the truth, the greater the libel. He put the case of a woman who, having erred in her youth, had afterwards, when residing in another part of the country, married a respectable man, and had become the mother of a family; and he supposed a person, knowing the events of the earlier part of her life, to disclose them for the purpose of annoying her husband, or herself, or her family. The way in which he put the case we cannot attempt to relate. In his quiet tone, Lord Abinger asked, if in such a case the saying would not be true: the greater the truth, the greater the libel. He told them to ask their own hearts for answer. We well remember the answer our own feelings gave; and we could plainly perceive the effect of the question on the minds of the jury; and we now refer to it, not for the purpose of illustrating a paradox, but for the purpose of illustrating the sort of power one of the most successful of modern pleaders, carrying his skill to the bench, exercised over the minds of others.

Lord Ellenborough commanded juries by look and tone. His personal dignity was in itself a power and a strength; but it did not always prevail. The London juries came latterly to resist his charges, as too dictatorial. There have been other instances of the jealousy of juries of habitual attempts by judges to lead them or command them.

Lord Tenterden was more successful, by reason of his lucid statement of the facts, and of the law applicable to them. He seemed to travel with the jury along the right path to justice.

Lord Denman was a striking instance of the power which one man can exercise over other men, when he combines in his one per-

son the scholar, the lawyer, the magistrate, the gentleman. Without art, certainly without the appearance of art, he won the confidence of juries. English lawyers may be proud of Lord Denman.

We sometimes hear praised the careful summing up of a painstaking judge. But how often is a summing up too minutely careful, setting the facts and the combinations of the facts in every possible light, going over them again and again, and distinguishing slight shades from still slighter shades, until every juryman and every listener is in a state of bewilderment, from which it is hopeless that the jury can recover, with their faculties in a state fit for deliberation. Many of our readers are not old enough to have heard Mr. Justice Littledale sum up, in this manner, circumstantial evidence; and some of his successors have had the same fault. Unfortunately, too, this fault, or weakness, or want of skill, is more frequently shown in the most important trials, those of which the result affects the life of the accused,—trials for murder. The importance of the trial very properly makes the judge as careful as it is in his power to be; but it unfortunately happens that the more care a judge of this character takes, the more inefficient he becomes.

To return to our subject. It remains to be seen whether it will be the practice of parties to consent to dispense with juries. This we consider at least doubtful. When there is a difference between two parties, one may be in the right, and the other in the wrong; but it often happens that both are in the wrong, one being more wrong than the other. The one in the right, or least in the wrong, needs a remedy. He is the most likely of the two to go to law, and he is the most likely to desire that sort of trial which is the most likely to bring the truth to light. He would most likely prefer the judgment of a single judge, a lawyer accustomed to sift and weigh evidence, to the verdict of twelve men taken by lot from the very miscellaneous classes of persons of whose names the jury lists consist. On the contrary, the party in the wrong, or least in the right, is interested in withholding a remedy. He is not the one to commence proceedings; and if proceedings are taken against him, he would most likely prefer the chance of a

verdict of a jury in his favor, to the probability of the judgment of a single judge against him. He is not likely to give his consent to a trial without a jury.

What has happened in the County Courts may serve to illustrate what we mean. In the case of a difference not within the ordinary jurisdiction of the County Courts,—for instance, a dispute involving a question as to the title to land,—the parties in difference may, by consent, give a County Court jurisdiction between them, and thus avoid the delay and expense of a trial at the assizes. Consents of this sort are so rarely given, that the law giving effect to them is almost a dead letter; and inquiries have been made as to the cause of this. Some have suggested the reason to be the interest which the lawyers, by whom the parties in difference are advised, have in preferring the more expensive remedy; but we have formed an opinion that the true cause is the natural disinclination of a wrongdoer to facilitate a remedy for the wrong he has inflicted, and his natural disinclination to do that which may lead to his being compelled to make restitution. He cannot be expected to consent to a cheap remedy. He is more likely to hope that his opponent will, for want of means, be unable to proceed to trial at the assizes, involving, among other great expenses, the maintenance of witnesses for days at an assize town. Universal experience tells us that the game of the wrongdoer is, by delay and increase of expense, to wear out the means and hopes of the person whom he has wronged.

We are inclined to think the better way would be to permit any sort of action to be brought in a County Court at the option of the plaintiff, giving the defendant an equal option to remove into a superior court any cause involving a question not now within the ordinary jurisdiction of the County Court. A person who would refuse an express consent to an action being brought against him, might, nevertheless, not care to take the trouble and incur the expense of removing it when actually brought. Here, again, what we mean is illustrated by what has happened in the County Courts. In any of those Courts any cause is, as a matter of course, tried by the judge without a jury, unless in some cases either party requires a jury. It is very rarely that a jury is required. Things take

their course. So we think it would be better in the Superior Courts if, instead of the dispensing with a jury being made dependent on the concurrence of two parties already in difference, the recourse to a jury were made dependent on its being expressly required by one of them.

Nevertheless, upon the probable supposition that there will be some trials in the Superior Courts of Common Law without juries, we propose to discuss the new functions with which the judges are now invested. Henceforth, instead of having, in all trials of questions of fact, to perform the embarrassing duty of assisting others to do what they could do better alone, they will sometimes find themselves in a position in which their function will be to listen carefully to the evidence, to sift, and compare, and weigh it calmly, to form their impartial conclusions, and to express them clearly, satisfying their own consciences, instead of endeavoring, often vainly, to give a right direction to the consciences of twelve other persons, and making attempts to lead them to a right conclusion.

We will now consider, as forming, it will be seen, a part of our present subject, some of the means of detecting truth when hidden in a mass of conflicting evidence. This is more likely to be effected, now that the interested parties may be heard, than when their evidence was rejected. Those who really know the truth, are now permitted, or if they hold back, may be required to give evidence. In a trial of a question of fact, the truth may generally be said to be present in court, known to one or more persons who conceal it: the object is to bring it to light. Of the various tests of truth, with which the experience of lawyers have made them long familiar, we do not propose to speak. We intend to confine our remarks to those tests only which have become useful by reason of the evidence of interested parties being made admissible.

It sometimes happens that, when two persons, both interested, and both from their character or from circumstances equally unworthy of credit, contradict each other in their evidence, the truth, or the probable truth, may be elicited from their statements, by the process of comparing admissions inadvertently made by one

against his interests, with admissions inadvertently made by the other against his interest. Sometimes, too, admissions against apparent interest are not inadvertent, and are mixed up with false statements for the purpose of giving them a show of candor, or a tinge of honesty. Admissions often supply a clue which may lead to the discovery of the truth, and they are sometimes elicited from a party by effective cross-examination, or by a concluding examination by the judge himself, acting on materials elicited by the counsel in their examination of the parties or witnesses.

Points of this sort have always been of especial importance in the County Courts, in which, from their first establishment, the parties interested have been examined as witnesses. They become more important, because available in a more important judicial sphere, from the time a change of the law rendered the evidence of interested parties admissible in the Superior Courts.

In the County Courts, too, these points were, from the first, of great importance, because questions of fact have always in those courts been generally decided by the judges, the parties seldom having recourse to juries. A judge who can, with sufficient skill, collate admissions made by interested parties, each against himself, so as to arrive at the truth, or probable truth, might find it difficult to suggest, much more to explain to a jury such a course of reasoning, and impossible to direct them, or even give them effectual assistance in the application of it to the questions under investigation. As it may be thought that some of the judges of the County Courts have derived from their past experience, so it may be considered certain that the judges of the Superior Courts will derive from their future experience, powers of analyzing evidence, the greater from their minds not being disturbed in the application of the appropriate tests, by the necessity of finding words by means of which to express to juries the difficult points to be considered. It may be hoped that some of our judges may now have an opportunity of becoming, in the history of their profession, the rivals of Sir William Scott, the great master of the art of discovering truth through the veil of falsehood.

If we might venture a suggestion to the learned persons for whom

we are now contemplating a new sphere of utility and fame, we would suggest the necessity for curbing any feelings of impatience, leading to too early an expression of the effect which is being made by evidence on the mind. From this fault, juries have been usually free, by reason of their habitually passive demeanor. It is a fault to which an active-minded judge may be found very liable, unless he is most careful to avoid it. The more immediate bad effect of impatience or hastiness on the part of a judge may be that, at an early part of the trial, parties or witnesses may be exposed to censure, which further investigation or reflection may show them not to deserve. The more real bad effect is the embarrassment produced on the mind of the judge himself, if, before having heard all the evidence, he makes known the impression made on him by a part of it. A judge, who too soon makes known what is passing in his mind, may not only raise on the one side hopes, and on the other side fears, either of which may needlessly embarrass the party subject to them in the conduct of the cause, but may impose on himself the embarrassing necessity, firstly, of rectifying expressed opinions, and, secondly, of finding terms by means of which fitly to express the change which his opinions undergo. It is an undignified position for a judge to find himself obliged to unsay what he has spoken from the bench, and injurious to his reputation to be often obliged to do so; but, moreover, the thing itself is so difficult to do well as materially to impair the efficiency of a judge in the particular cause in which it becomes necessary. The process is hardly consistent with the calmness necessary for the right conduct of a judicial inquiry. The last act of the trial, the delivery of the judgment, when all the proofs and arguments have been heard and considered, is, generally speaking, the earliest period at which a judge can safely give utterance to his opinions or his feelings, and then, so far as is right for the purpose of making known the grounds of his judgment, his place is plainly and fearlessly to declare his opinions and his feelings. We do not say that exceptions will not occur to the rule we are insisting on, that a judge must carefully guard himself against every disposition to impatience. Roguish claims are sometimes

made, and roguish defences are sometimes attempted, which cannot be expected to receive from a man of right feeling any other regard than that of scorn, or any other treatment than that of being summarily crushed. Cases of this sort happen from time to time, but they are comparatively of rare occurrence, and the safest course for a judge is to be slow to perceive them. It is a fatal error to be too ready to stop causes. Injustice, or the sense of injustice, thus caused, may be irreparable. On the other hand, a cause stopped on safe grounds is an excellent precedent, deterring other suitors from attempts to practise imposition on courts of justice.

It will be perceived that we anticipate great advantages to the judicial character from the practice, if it should prevail, of dispensing with juries. We are also sanguine enough to hope for still greater advantages to the character of the English advocate. Sophistry, passion apart from reason, rhetoric without logic, will no longer be effective weapons. Fluency, verbiage, iteration, will be valueless. Clamor, and abuse of parties and witnesses, and personal display, will not serve as substiutes for argument. Those men who, now at the Bar, adorn their profession by their real eloquence, their skill in argument, by their appeals to the feelings, when the feelings are fairly interested, by language deriving real strength from its gravity and moderation, will meet with more ample rewards and honors, and will find many imitators. Then will be felt the truth of the principle, too often unheeded, that the advocate is properly the assistant of the judge, bound to say all that he can fairly say for the party for whom he is retained, but not justified in attempting to mislead the Court or jury by the distortion of facts, or by any artifice inconsistent with a regard for truth. Those persons who, in the struggle for success, have hitherto sometimes more or less habitually yielded to the temptation to say that for their clients which a man would not, consistently with honesty, say for himself, will, when addressing a single judge trying questions of fact, find that such practices must be given up, as unavailing in each particular case, and as destructive of the character of the advocates who have recourse to them. We feel assured, not without some experience to warrant the assertion, that an advocate, properly

qualified for his office, will find his services useful to his clients, in proportion to the candor with which, urging all that may be fairly urged, he abstains from addressing to the Court arguments tainted with falsehood. It is no fanciful contrast to draw, that on the one side of the high-minded pleader of causes, the advocate, in the true sense of the word, who, scorning unworthy artifice, renders good service in the administration of justice; and, on the other side, of the mere hireling, who, with no other object than that of obtaining verdicts, whether rightly or wrongly, habitually distorts the facts, and is an unworthy disturber of what, but for him, might be the pure stream of justice. We believe that the first class is, in these times, becoming more numerous, the latter class more rare. We firmly believe that the more frequent trials of questions of fact by experienced judges, instead of inexperienced jurymen, become, the sooner will the class of unworthy hirelings vanish from our tribunals, and the sooner shall we see realized the theory, that the advocate is an assistant judge. Need we dilate on the consequent advantages to the judge, to the litigants, and to the community?

We have yet one suggestion to make to the learned judges; the importance of a summing up, a statement of the grounds of each decision. We have reason to believe that the suitors will be better satisfied, if a judge, who, deciding questions of fact, will state the grounds of his decision, than if he pronounces a bare "Judgment for the plaintiff," or "Judgment for the defendant," like the verdict of a jury, for the plaintiff, or for the defendant. But we should not have adverted to this point, were it not that we have still greater reason for believing that the losing party likes to know why he loses, and is pleased if he can gather from the judgment, that all facts and arguments, making apparently in his favor, have received due consideration. But this, and similar points, occupy doubtless the thoughts of those who have now cast on them a new class of duties. To the discharge of those duties they will bring those qualities which make them worthy of their high position, rendered still higher and more useful by their becoming now, more than ever, the real arbiters of questions and disputes arising among the inhabitants of this great country. J. F.